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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 84-176

UTILITY CONSULTING SERVICES, INC.,
Appellant,

v.

CITY OF SAN JUAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

MOTION TO DISMISS OR TO AFFIRM

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TABLE OF CONTENTS

		Page
JURISDICTION		1
1.	Judgment of the Supreme Court of Puerto Rico entered on February 14, 1984	2
2.	Motion for reconsideration dated February 23, 1984	2
3.	Denial of the reconsideration	3
4.	Time in which to file subsequent motions for reconsideration	3
5.	Motion requesting the Retention of the Mandate dated March 28, 1984	3
6.	Denial of the motion for the Retention of the Mandate	3
7.	Motion for reconsideration of the Denial of the Request to Retain the Mandate	3
8.	Motion Seeking to Set Aside Judgment	3
9.	Notice of Appeal dated June 28, 1984	4
10.	Untimeliness of Notice of Appeal	4-5
11.	Motion to Dismiss the Appeal filed by Appellee before the Supreme Court of Puerto Rico	5
12.	Dismissal of the appeal requested because attempts to raise the federal questions and the notice of appeal were both untimely	5
13.	Dismissal of the appeal or affirmance of the judgment below requested because of the insubstantial constitutional challenge and because the State court's decision rests on an adequate and independent non-federal ground	6
PETITION		6

TABLE OF AUTHORITIES

Page

CASES:

Fowler v. *Hamill,* N.Y. 189, 11 S.Ct. 663, 139 U.S. 549, 35 L. Ed. 266

Good Intent Towboat Co. v. *Atlantic Mut. Ins. Co.,* La. 1883, 3 S.Ct. 78, 109 U.S. 110, 27 L. Ed. 874

Green v. *Elbert,* Colo. 1891, 11 S.Ct. 188, 137 U.S. 615, 34 L. Ed. 792

Hanson v. *Denckla,* 1958, 78 S.Ct. 1228, 357 U.S. 235, 2 L. Ed. 2d. 1283

Hicks v. *Miranda,* 1975, 95 S.Ct. 2281, 422 U.S. 332, 45 L. Ed. 2d. 223

Radio Station WOW, Inc. v. *Johnson,* 1945, 65 S.Ct. 1475, 326 U.S. 120, 89 L. Ed. 2092

Whitsitt v. *Union Depot, etc., Co.,* Colo. 1887 7 S.Ct. 1248, 122 U.S. 363, 30 L. Ed. 1150

U.S. CONSTITUTION:

Article 1, Section 10

STATUTES:

Section 1210, Civil Code of Puerto Rico, 31 LPRA sec. 3375

RULES:

U.S. Supreme Court Rules:

Rule 11 par. .3

Rule 12 par. .1 and .3

Rule 14 par. .2

Rule 16(b)

Rule 16(h)

Puerto Rico Supreme Court Rules:

Rule 45(a)

Rule 45(c)

No. 84-176

IN THE

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

MOTION TO DISMISS OR TO AFFIRM

TO THE HONORABLE SUPREME COURT:

COMES NOW, Appellee duly represented by its undersigned attorney and in response to the Jurisdictional Statement filed by Appellant, respectfully states, alleges and prays:

Appellee requests that the Court dismiss the appeal for lack of jurisdiction or, in the alternative, affirm the judgment of the Supreme Court of Puerto Rico.

JURISDICTION

Rule 16(h) of the Supreme Court Rules provides that "the Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis".

Appellant (UCS), in its Jurisdictional Statement claims, at pages 3 and 7, that UCS filed two timely motions for reconsideration, arguing in one that the interpretation of Section 1210 of the Puerto Rico Civil Code, 31 LPRA sec. 3375, was unsound, and contending in the other that the court's construction and application of Section 1210 violated the United States Constitution by depriving UCS of property without due process of law and by impairing the obligations of UCS's contract in violation of Article 1, Section 10 of the Constitution.

This claim in appellant's Jurisdictional Statement is unfounded. The true facts as to the two motions filed by appellant are the following:

1. The judgment of the Supreme Court of Puerto Rico was entered on February 14, 1984 (see Appellant's Appendix A). According to the Rules of the Supreme Court of Puerto Rico, UCS had ten working days in which to file a motion for reconsideration (see Rule 45(a) of the Rules of the Supreme Court of Puerto Rico).

2. A timely motion for reconsideration was filed by UCS on February 23, 1984 (Appendix I). However, in this motion for reconsideration UCS basically argued that the Supreme Court of Puerto Rico's interpretation of Section 1210 of the Civil Code of Puerto Rico was unsound. UCS did not raise any federal question in this motion. Consequently, at the first opportunity Appellant failed to raise a federal question. This is reason enough to dismiss this appeal. See: *Radio Station WOW, Inc. v. Johnson*, 1945, 65 S.Ct. 1475, 1480, 326 U.S. 120, 128, 89 L.Ed. 2092, 2100; *Hanson v. Denckla*, 1958, 78 S.Ct. 1228, 1234, 357 U.S. 235, 243-244, 2 L.Ed.2d 1283, 1292.

3. On March 19, 1984 the Supreme Court denied the reconsideration requested (Appendix II).

4. According to Rule 45(c) of the Rules of the Supreme Court of Puerto Rico any subsequent motion for reconsideration has to be filed within three working days after the resolution of the first motion for reconsideration. UCS did not

file a second motion within said period and no additional reconsideration was requested in this case.

5. On March 28, 1984 UCS filed a Motion requesting the Retention of the Mandate. On said Motion, which was not a motion for reconsideration, UCS announced that it was appealing the case to the U.S. Supreme Court but did not raise any federal questions (Appendix III).

6. UCS's motion for the retention of the mandate was denied by the Supreme Court of Puerto Rico on April 12, 1984.

7. On April 17, 1984 UCS filed a Motion for Reconsideration of the Denial of the Request to Retain the Mandate. In it it did not raise any federal questions (Appendix IV).

8. Realizing it had failed to raise a federal question, on April 23, 1984 UCS filed its motion purporting to raise federal questions. UCS entitled it as "Motion Seeking to Set Aside Judgment" (Appendix V). This motion, together with the "Motion for Reconsideration of Denial of Request to Retain the Mandate" were denied by the Supreme Court of Puerto Rico on May 3, 1984 (Appendix VI). The Court will note that these are the exact translations into English of the two motions denied without opinion by the Supreme Court of Puerto Rico on May 3, 1984. They differ significantly from the translation made by UCS (see Appellant's Appendix C). The Motion Seeking to Set Aside Judgment could in no way be considered a second motion for Reconsideration for as such it would have been untimely. As aforestated, Rule 45(c) of the Rules of the Supreme Court of Puerto Rico grants only three working days in which to request reconsiderations following the denial of the first reconsideration. The Motion Seeking to Set Aside Judgment was filed thirty five days after the denial of the reconsideration.

9. On June 28, 1984 UCS filed before the Supreme Court of Puerto Rico a Notice of Appeal to this Court. According to Rule 12, paragraphs .1 and .3 of the U.S. Supreme Court Rules, the term in which to file Notice of Appeal and to Docket it is of ninety days. Said ninety days term begins, according to Rule 11, paragraph .3 of the Rules of the U.S. Supreme Court, "from

the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate... However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties... runs from the date of the denial of rehearing...."

10. The rehearing requested by UCS in the instant case was denied on March 19, 1984. The Notice of Appeal was filed on June 28, 1984, that is, one hundred and one days after the denial of the reconsideration. Thus the notice of appeal was untimely.

11. Based on the above considerations, Appellee herein, claiming that UCS's appeal to this Court was untimely, and pursuant to the provisions of Rules 12 paragraphs 1 and 3, 11 paragraph 3 and 14, paragraph 2 filed in the Supreme Court of Puerto Rico a Motion to Dismiss the Appeal to this Court (see Appendix VII). No opposition was filed by UCS regarding this motion which has not been decided as yet by the Supreme Court of Puerto Rico.

12. For the same reasons expressed above, namely, that the motion in which UCS attempts to raise the federal questions was untimely and that the notice of appeal was also untimely, under Rule 16(b) of the Rules of the Supreme Court of the United States, this Court should dismiss the appeal because "the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on" by the Supreme Court of Puerto Rico. It is ground for dismissal of an appeal that it is not taken within the time prescribed. *Whitsitt* v. *Union Depot, etc., Co.,* Colo. 1887, 7 S.Ct. 1248, 122 U.S. 363, 30 L.Ed. 1150; See also *Fowler* v. *Hamill,* N.Y. 1891, 11 S.Ct. 663, 139 U.S. 549, 35 L.Ed. 266; *Good Intent Towboat Co.* v. *Atlantic Mut. Ins. Co.,* La. 1883, 3 S.Ct. 78, 109 U.S. 110, 27 L.Ed. 874; Cf. *Green* v. *Elbert,* Colo. 1891, 11 S.Ct. 188, 137 U.S. 615, 34 L.Ed. 792.

13. The Supreme Court of Puerto Rico in this case reversed the judgment of the lower court by applying to the facts of the case the Civil Law Doctrine of unforeseeability, contained in the Roman Maxim "rebus sic stantibus". See the

first paragraph of page 4a of Appellant's Appendix A, which is a translation of the judgment of the Supreme Court of Puerto Rico. UCS claims in essence that the application of the Civil Law Doctrine is unconstitutional. This is clearly not so. An insubstantial constitutional challenge to a State statute is basis for a dismissal of the appeal. *Hicks* v. *Miranda,* 1975, 95 S.Ct. 2281, 422 U.S. 332, 45 L.Ed.2d 223. Moreover, when, as in this case, the State court decision rests on an adequate and independent non-federal ground, there is no jurisdiction in this Court. *Radio Station WOW, Inc.* v. *Johnson, supra.* Consequently, appellant's jurisdictional statement does not present a substantial federal question and either the appeal should be dismissed according to Rule 16(b) or the judgment below should be affirmed.

WHEREFORE, Appellee respectfully requests to this Court that Appellant's appeal be dismissed for lack of appellate jurisdiction or that the Judgment of the Supreme Court of Puerto Rico be affirmed.

Respectfully Submitted

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APPENDIX I

IN THE

SUPREME COURT OF PUERTO RICO

No. R-83-51
R-83-52

UTILITY CONSULTING SERVICES, INC.,
Plaintiff-Appellee,

v.

MUNICIPALITY OF SAN JUAN,
DR. HERNAN PADILLA,
Defendants-Appellants.

PETITION FOR REVIEW

MOTION FOR RECONSIDERATION OF JUDGMENT

TO THE HONORABLE SUPREME COURT:

Now comes the appellee, Utility Consulting Services, Inc. (hereinafter UCS) and files the following Brief in Support of the Motion for Reconsideration of the Judgment entered on February 14, 1984 by this Honorable Court in the instant case. Said judgment was notified on February 15, 1984 to the appearing party by mail, as it appears from the post mark of the envelope containing said judgment.

STATEMENT OF PERTINENT FACTS

On November 10, 1982 the Honorable Pedro J. Martínez Montañez, Judge of the Superior Court, entered judgment in Civil Case 80-2500, for Civil Action, Collection of Money and

Damages, entitled *Utility Consulting Services, Inc.* v. *Municipality of San Juan and Dr. Hernán Padilla.*

On November 22, 1982 the Municipality of San Juan filed a motion requesting Additional Findings of Fact and Conclusions of Law, which motion was denied by the Honorable Pedro J. Martínez Montañez. The judgment involved in this petition for review sentences codefendant Municipality of San Juan to pay to plaintiff-appellee the amount of $2,516,965.48 for services rendered and not paid, in contravention of the stipulations contained in the contract for services dated July 5, 1973. The same resulted from credits and savings obtained by the Municipality of San Juan for the services rendered by plaintiff pursuant to said contract, plus legal interest accrued from the date on which judgment was entered.

On February 2, 1983 defendant-appellant filed a Petition for Review against said judgment before this Honorable Court. Subsequently, on April 28, 1983, defendant-appellant filed its Brief in Support of the Petition for Review. The brief by plaintiff-appellee was filed herein on May 27, 1983. Later, on July 26, 1983, defendant-appellant filed a Reply to appellee's brief and on September 12, 1983 the appearing party filed its Answer to Appellant's Reply. Thus, the case was taken under advisement by this Honorable Court, leading to the judgment of February 14, 1984 mentioned above.

QUESTIONS OF LAW RAISED

After an examination of the record of the case before the Superior Court, San Juan Part, as well as of the respective briefs filed by the parties in the instant case and of the judgment entered by this Honorable Court, the appearing party respectfully disagrees with the judgment entered herein and asks for its reconsideration under the following grounds:

I. This Honorable Court erred upon interpreting the contract in the instant case and upon finding the same was excessively onerous to the degree of implying bad faith on the part of plaintiff-appellee.

II. This Honorable Court erred upon using the allegations contained in defendant-appellant's brief as ground for its conclusion that the contract was excessively onerous.

III. The conclusion reached by this Honorable Court in the sense that the contract was excessively onerous has no basis in the evidence presented before the Superior Court, San Juan Part, object of its judgment of November 10, 1982. This conclusion has the effect of a deprival of the appearing party's rights since it allows an unjust enrichment on the part of defendant-appellant, Municipality of San Juan.

ARGUMENT

I. This Honorable Court erred upon interpreting the contract in the instant case and upon finding the same was excessively onerous to the degree of implying bad faith on the part of plaintiff-appellee.

The effects of the contract executed between the parties are resumed in Section 1044 of the Civil Code, 31 L.P.R.A. 2994, in the following terms:

> "Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations."

No other formula could more expressly set forth the binding force of the obligations arising from the consent of the parties than the phrase "have legal force" included in said section of the law. It actually means that each contracting party is bound by the contract as if the obligation is imposed by the law itself. It is pertinent to add that the contracting parties are not only bound by the explicit clauses contained in the contract, but that said obligation is also extensive to all the consequences, which although not expressed, are derived from the nature of the contract in accordance with good faith, use, and law. Section 1210 of the Civil Code, 31 L.P.R.A. 3375.

Three consequences can be inferred from the principle that the contractual bond is as stronger as the order directed by the law: 1) the contracting party cannot elude its obligation by its

sole will, it is definitively and irrevocably obliged by the covenant; 2) the interpretation of the contracts by the court; and 3) the court is subject in its interpretation to the contract.

Contracts cannot be revoked but by the mutual consent of the parties, that is, through a new meeting of minds which may destroy the effects of the former contract, by a "mutus dissensus".

In the event a discrepancy may arise between the parties with respect to the performance of the contract, the court must interpret said contract as it would interpret the law. It must not substitute its own will to that of the parties nor find the solution in the texts of law. That is, it must resort to the latter only in the event the contract is silent in connection therewith. So as to guide the court in said interpretation, the Civil Code prescribes a number of rules which are contained in Chapter IV, Title 2 of Volume Four, Sections 1233 to 1241, 31 L.P.R.A. 3431 to 3439.

Section 1233 of the Civil Code in effect, 31 L.P.R.A. 3471, provides as follows:

> "If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed.
>
> "If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail."

Where the terms of a contract are clear and explicit and leave no doubt as to the intention of the contracting parties, the clauses thereof will be literally construed one with another and giving to the doubtful clauses the meaning which clearly appears from all of them and the intention of the contracting parties must always be made to prevail. *Finlay* v. *Finlay Brothers & Waymouth Trading Co.*, 8 P.R.R. 371 (1905). Opinion of the Secretary of Justice No. 17 of 1972.

Where no doubt arises either from the terms of a contract or from the acts of the parties in entering into the agreement in question, rules of construction of contracts will not be resorted to. *National City Bank* v. *Martinez*, 41 P.R.R. 162 (1930).

When the terms of a contract are clear and leave no doubt as to the intention of the contracting parties, courts must confine themselves to a literal application of the clauses thereof. *Esbrí* v. *Estate of Juan Serrallès*, 3 P.R.R. 24 (1902).

Upon interpreting in recent cases the provisions of Section 1233 mentioned above, this Honorable Court has provided that the intention of the contracting parties must be judged paying attention principally to their acts, contemporaneous and subsequent to the contract. If any stipulation of a contract should admit different meanings, it should be understood in the sense most suitable to give effect. *San Miguel Fertil. Corp.* v. *P. R. Drydock*, 94 P.R.R. 403 (1967). *Miranda* v. *Editorial El Imparcial, Inc.*, 99 P.R.R. 583 (1971). The intention of the parties is what determines the scope of the contractual obligations and said intention is judged taking into consideration, not only the acts contemporaneous and subsequent to the contract, but also all the other circumstances indicative of the will of the parties. *García López* v. *Méndez García*, 102 D.P.R. 383 (1974).

The controlling theory in said rules is the classical autonomy of the will which purports that the interpretation of contracts should be an exclusive problem of psychological analysis and finding of intention. And this theory is so strict in the Civil Code that if the court finds it impossible to ascertain the real intention or will of the contracting parties, the contract shall be void as provided in Section 1241 of the Civil Code of Puerto Rico, 31 L.P.R.A. 3479.

The court cannot refuse to apply, even when they are found to be contrary to equity, the clauses of a contract which are not prohibited by law. It has no other choice but to abide by the intention clearly expressed by the parties.

A segment of the doctrine maintains the position that courts have the faculty to modify or annul the contract when the conditions of performance are excessively onerous as a result of the occurrence of unforeseeable or exceptional events. The supporters of the theory of unforeseeable events maintain that on all long-term contracts the clause of "rebus sic stantibus" is implicitly found, and therefore, that the court is empowered to

change the terms thereof if they constitute a serious prejudice to the debtor as a result of the variation in the original conditions. The court should act with extreme care in such circumstances.

In the decision in *Casera Food, Inc.* v. *Commonwealth of Puerto Rico*, 108 D.P.R. 850 (1979), quoting José Castán Tobeñas, *Derecho Civil Español, Común y Foral*, Volume 3, at page 548 (1974), this Honorable Court speaks about this doctrine as the forensic practice of the medieval era. Then they always considered it as implied in long-term or successive tract contracts when an important change would occur in the existing or contemplated state of facts by the parties upon contracting, the obligee could rescind the contract which had turned out extremely onerous to comply.

This Honorable Court states in that same case that as time went by the effectiveness of the "rebus sic stantibus" doctrine started to lose importance, lost its reputation and was ignored. Upon deciding the *Casera Food Products, Inc.* v. *Commonwealth of Puerto Rico* case mentioned above, this Honorable Court states that *the determining factor which justified, by way of exception, the judicial intervention and review, was absent* in this particular case, *to wit, an unforeseeable change not currently expected by the parties.* (Emphasis added.)

No unforeseeable change, not currently expected, to the covenants of the contract executed last July 5, 1983 took place herein.

Those who challenge the theory mentioned above, supported by the principle of "pacta sunt servanda" argue that the contract is exactly a foreseeable act, since upon stipulating its terms the creditor looks out to protect himself from future contingencies. They also argue that leaving to the court the power to review it by reason of the occurrence of exceptional circumstances appreciated by it, would imply the destruction of the obligatory force of the contract, basis and security of the credit. The lawmaker is the only one who could grant the court said power and he has granted it only the limited power to agree on grace periods, as provided in Section 1077 of the Civil Code, 31 L.P.R.A. 3052.

From that third point of view the obligatory nature of the contract is still stronger than the law. In fact, the clauses of a contract continue in force between the parties even if a new law may modify, in general terms, its juridical effect. In other words, the law applicable between the parties remains in force between them notwithstanding that contrary provisions are subsequently prescribed by the lawmaker. If in a loan agreement the parties stipulate that the borrower shall pay the annual interest at the legal rate in effect upon the execution of the contract, and thereafter a subsequent law decreases or increases the legal rate of interest, the rate in effect upon the execution of the contract shall continue to apply, except in the event of an express provision by the parties to the contrary.

This Honorable Court bases its judgment on the provisions of Section 1210 of the Civil Code, 31 L.P.R.A. 3375. The same prescribes that the contracting parties bind themselves to all the consequences which, pursuant to their character, are in accordance with good faith, use, and law, giving emphasis to the element of good faith.

In its conclusion this Honorable Court mentions that the existence of excessive onerousness found by it allows a scope of bad faith to the contract involved in this suit and, therefore, permits the review by this Honorable Court of the clauses of the contract which resulted in its judgment.

In the broadest sense, the phrase bad faith is synonymous of deceit. This, in its most rigorous sense, means the machinations or fraud of which a person avails himself to induce by error another person to obtain his consent. Section 1221 of the Civil Code, 31 L.P.R.A. 3408, states:

> "There is deceit when by words or insidious machinations on the part of one of the contracting parties the other is induced to execute a contract which without them he would not have made."

The terms deceit and fraud should not be confused. The term deceit has the characteristics of taking place prior to the act which it annuls and exercised in front of one of the contracting parties. In order that deceit may produce the nullity

of the contract, that is to say, that the bad faith may produce the nullity of the contract, the same should be of a serious nature and must not have been employed by the two contracting parties. According to Section 1222 of the Civil Code, 31 L.P.R.A. 3409, there must concur three previous conditions in order that deceit may give occasion to the nullity of the contract: 1) that it be serious; 2) that deceit may be employed by one of the contracting parties; and 3) that deceit may not be employed by both of the contracting parties. We then understand that in an strict sense bad faith, having the effects of employing deceit between the contracting parties which produces the nullity of the contract, as inferred by this Honorable Court in its judgment in the case at bar, ought to be proved. There exists the legal presumption that people act in good faith and that private transactions are executed in good faith and according to law. *In Re Las Colinas, Inc.*, 294 F. Supp. 582 (1968), vacated on other grounds by *In Re Las Colinas, Inc.*, 426 F. Supp. 1005 (1970). This Honorable Court cannot allow the scope intended by it, determining the presence of bad faith, without a showing that there was a doubt or lack of clarity in the clauses of the contract, with the effect of declaring it null and nonexistent without binding effect upon the parties. This duty corresponds to the Superior Court, San Juan Part, after weighing all the oral and documentary evidence introduced before it. The defendant-appellant has at no time presented said evidence to this Honorable Court in order to place it in a position to replace the trial court.

In the decision of *Cándido R. López de Victoria* v. *Ana Mercedes Rodríquez*, 87 J.T.S. 109, upon evaluating a situation involving the agreement of contingent fees, as happens in the instant case, this Honorable Court finds that "*it can be said that the agreement of contingent fees not limited by special legislation at present has ethical acceptance if it complies with the rules prescribed by the canons of professional ethics and the moral value of good faith contained in Section 1210 of the Civil Code, 31 L.P.R.A. 3375* (emphasis added)."

Likewise, it maintains that as in any contract, the excessive onerousness which reaches the extent of bad faith, that denies such collective rules of conduct which must be observed by every honest and loyal conscience, connatural to the contract, could justify moderate intervention of the court. First, it is clear that the intervention of this Honorable Court in connection with the contract between the parties has not been of a moderate nature, as imposed by the Court itself in the case mentioned above. It is also clear that in order to prove or come to the conclusion that the excessive onerousness is such that reaches the extent of bad faith, it is not sufficient for the court to make its interpretation from some briefs filed in a writ of review. The oral evidence has actually to be heard or at least have the benefit of examining and reading a transcript of the whole evidence or a summary thereof upon previous agreement between the parties.

We respectfully understand that this Honorable Court has acted beyond the doctrines adopted and established by this same Court in regard to the interpretation of contracts. And the finding that bad faith is presumed on the basis of a conclusion that there is excessive onerousness, without giving the affected party the opportunity of being heard or at least request the remittal of the record of this case so as to be properly weighed and valued. All this before taking such a severe and inordinate action in the appreciation of the clauses of the contract which, from a mere reading, is evidently clear and specific.

II. This Honorable Court erred upon using the allegations contained in defendant-appellant's brief as ground for its conclusion that the contract was excessively onerous.

Rule 54.2 of the Rules of Civil Procedure in effect establishes as part of the review procedure of a judgment that within twenty (20) days of the issuance of the writ of review, appellant shall prepare a statement of the evidence or a report of the proceedings using for that purpose the best available means, including his recollections. It also provides that said statement or report shall be served upon the opposing party, who shall file its objections and propose amendments thereto within ten (10) days after such service; and that thereafter said

statement or report, with its proposed amendments or objections, shall be submitted to the Superior Court for its resolution and approval; and the Clerk of said court shall include them in the record of review thus resolved and approved. This was not done by the defendant-appellant notwithstanding that according to the rule described above, it corresponds to the petitioner in a review proceeding to put this Honorable Court in a position to revise a judgment. After all, it is said party which is not in agreement with the judgment of the trial court. The Municipality of San Juan has failed to comply with this rule, but intends that this Honorable Court may award the case in the light of certain facts different from those which were presented to the trial court. At pages 301 to 303 of the original record of this case it appears that the Municipality of San Juan asked permission to record again the hearing held in this case, which permission was granted by the Court. Therefore, the Municipality of San Juan is in the best position of preparing a narrative statement and comply with the provisions of Rule 54.2 and in that way place this Honorable Court in a position of knowing the truth as to everything that transpired before the Honorable Judge Pedro J. Martínez Montañez, and not only a very particular truth in connection with its points of view.

A cursory reading of the twelve (12) pages devoted by the Municipality of San Juan to its statement of the facts shows the importance for this Honorable Court to be in a position to understand herein that a narrative statement of the evidence or a transcript of the oral evidence be submitted to it. We respectfully understand that the Court has not even been in the same position as the trial court to interpret a great amount of the documentary evidence since substantial portions of the oral testimony in this case was weighed in connection with the nature, scope and meaning of the documentary evidence and none of said testimony has been brought to the attention of this Honorable Court.

In the argument of question of law 1-C, entitled The Contract is in Contravention of Law, Morals and Public Order, included in pages twenty (20) to twenty eight (28) of the brief filed by the defendant-appellant on April 28, 1983, in contrast

to Section 1207 of the Civil Code, 31 L.P.R.A. 3372, said party states thus:

> "First: The only action taken by UCS in order that the alleged credit for $313,552.12 be produced was to call the attention of the Authority as to the authorization of an erroneous constant ratio. UCS's task to identify the error was 'simple': went to the place where the meter was located, put on special gloves, cleaned the plate and was able to read that the 'ratio' was 700 and not 7,000. See finding of fact number 19."

Finding of fact number 19 referred to above states the following:

> "19. The credit for $313,552.12 belongs to account number 10-11007-5200 (McCleary and Mozó streets) which covers the period from 7-8-72 to 6-6-78. This account belongs to the meter of the installation of a pumping equipment to prevent floods located at McLeary and María Mozó Streets, Santurce, Puerto Rico, which gathers pluvial water and takes it to the sea. (See appendix 19 of the Petition for Review, admitted in evidence as exhibit 9 for plaintiff.) The credit was produced since UCS called the attention of the Authority as they were invoicing 10 times more the amount owed, inasmuch as they were using a constant of 7,000 when it should have been 700. The task carried out by UCS to identify the error 'was simple' and directly with the Authority, as stated by Eng. Roberto Santos Quirós. Eng. Roberto Santos Quirós, its President, went over the place where the meter was located and asked permission to enter. He put on some special gloves, cleaned the plate and was able to read that 'the ratio' was 700 and not 7,000".

In the first paragraph of Part One, page two of the judgment, this Honorable Court considers as certain a fact which does not appear from the findings of fact of the judgment which revision is sought; it does not appear from the motion

requesting additional findings of fact and conclusions of law filed on November 22, 1982 by defendant-appellant before the Superior Court (see Appendix one of this motion). And this cannot appear from it because this was not the manner in which the evidence was introduced. Using almost *verbatim* the statements appearing in the brief filed by the defendant-appellant, this Honorable Court finds:

> "For a simple and sporadic work which at times was limited *to clean the window of a neglected meter and discover that the 'ratio' (coefficient) of rate was 700 and not 7,000 as was being invoiced; for the employment of minimum time and unspecified hours;* appellee invokes the contract to justify its credit over public funds for $2,749,044.10 generated in its majority during the three years following its intervention." (Emphasis added.)

This Honorable Court erred in accepting as correct information which was not before it in an authentic manner, which was always at the disposal of the defendant-appellant to be presented, so as not to induce this Honorable Court to error. From where does it appear in the evidence of the case, which at no time was available to this Honorable Court, that the *said meter was neglected;* from where does it appear that the *work done by the plaintiff-appellee was simple and sporadic;* from where does it appar that the work done by the plaintiff-appellee *was limited to clean the window of a meter;* from where does it appear that the only work carried out for the amount of $2,749,044.10 claimed herein *belong only to the discovery made in the alleged neglected meter.* This is not correct and it clearly appears from the findings of fact. Also, it can be correctly seen from the evidence introduced before the Honorable Pedro J. Martínez Montañez that the amount claimed belongs to three different stages of time and of fact, reason for which the amount described above is the aggregate sum of the valid, just, legal and reasonable claims that plaintiff-appellee has against the defendant appellant, Municipality of San Juan.

To maintain the contrary would be tantamount to perpetuate an error that unjustly benefits a governmental institution.

The latter was at all times acquainted with the work performed by plaintiff-appellee, obtaining benefit for several years from the credits and savings that the herein appearing party procured and obtained for its benefit and use.

We respectfully disagree with the form and manner in which this Honorable Court finds that there is high relief of inordinate degree between the prestations of the contracting parties which ends in the collapse of the contract due to the destruction of the balance of these mutual prestations. We respectfully maintain that this Honorable Court was never in a position to reach this conclusion; that it was not presented and was not able to have the benefit of at least examinig the narrative report or summary of the evidence which appellant was bound to prepare pursuant to the provisions of Rule 54.2. Based on it, this Honorable Court should set aside the deicision contained in Part One of its judgment.

III. The conclusion reached by this Honorable Court in the sense that the contract was excessively onerous has no basis in the evidence presented before the Superior Court, San Juan Part, object of its judgment of November 10, 1982. This conclusion has the effect of a deprival of the appearing party's rights since it allows an unjust enrichment on the part of defendant-appellant, Municipality of San Juan.

Conclusion of law number four of the judgment appealed from, provides that a contract executed between a governmental instrumentality and a private person should be interpreted as if we were dealing with a contract between two private persons. This Court quotes to that effect as authority for said conclusion the cases of *Zequeira* v. *Urban Renewal and Housing Corp.*, 83 P.R.R. 847 (1961) and *Rodriguez* v. *Municipality*, 75 P.R.R. 449 (1953). See also Opinions of the Secretary of Justice Number 17 of 1972, Number 11 of 1977, and Number 15 of 1978.

Aside form the juridical nature of the Municipality in Puerto Rico, it is clear that the obligations contracted by it are governed by the principles of Civil Law, subject to the laws

modifying such situation. The administrative contracts are currently governed, in the absence of a special rule, by the general theory of contracts. J. M. Auby and R. Drago, *Traité de Contentieux Administratif,* 2d Ed., Paris, Librairie Generale de Droit et de Jurisprudence, 1975, Volume II, page 480. This means that the doctrine of unjust enrichment, among others, is applicable to certain situations where one of the contracting parties is a public instrumentality. These provisions are included in the decision rendered by this Honorable Court on October 21, 1983 in *Plan de Bienestar de Salud de la Conferencia de Laboristas de Puerto Rico* v. *Mayor of Cabo Rojo,* quoted at 83 J.T.S. 87.

Being in agreement that the Municipality is but only another contracting party, it is then applicable Section 1207 of the Civil Code, 31 L.P.R.A. 3372, which provides as follows:

> "The contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals, or public order."

Since the contract involved herein is one for contingent fees and not having been shown by defendant-appellant that the instant contract is in contravention of law, morals, or public order, we have then to examine only the decision of this Honorable Court in *Cándido R. López de Victoria* v. *Ana Mercedes Rodríguez, supra,* which points out that:

> "It can be said that the agreement of contingent fees not limited by special legislation at present has ethical acceptance the if it complies with the rules prescribed by the canons of professional ethics and the moral value of good faith contained in Section 1210 of the Civil Code, 31 L.P.R.A. 3375."

Without risking anything the Municipality contracts with the appearing party consulting services and also for taking actions, steps or promoting procedures directed to reduce the expenses for electric service and for saving the amount presently being paid to the Puerto Rico Electric Power Authority. We respectfully understand that this is a valid and moral purpose

and in compliance with the public order and sound government administration. On the basis of this contract, acting on the benefit of and for the convenience of the defendant-appellant, plaintiff-appellee obtained the credits and savings mentioned hereinafter, as it appears from findings of fact number eight, ten, twelve and fourteen of the judgment appealed from (see Appendix II).

A. "An amount equivalent to 50% of any of the savings of the Municipality of San Juan resulting from the services rendered by plaintiff and which may correspond to the period comprised in the next 36 months of modification, adjustments, correction which prompted such savings in the accounts or service contracts of the Municipality."

B. "An amount equivalent to 50% of any credit or return of money paid, which was obtained or received by plaintiff as a result of the services rendered by plaintiff."

Based on said contract, and in opposition to the judgment entered by this Honorable Court in the instant case, defendant-appellant obtained the total of $5,033,784.22 for credits and savings and not of $2,404,101.38, as mentioned in the judgment. The Municipality of San Juan obtained benefits for $5,033,784.22 due to the steps taken by plaintiff-appellee with the Electric Power Authorty in its name and representation. For this reason it invoiced the Municipality of San Juan the sum of $2,516,892.11 on the basis of the contract.

Distinguishing the concepts, it appears that the Municipality of San Juan received a credtit from the Electric Power Authority in the amount of $2,404,101.38 as a result of the steps taken by plaintiff-appellee. The Municipality of San Juan was bound to pay this money from the funds appropriated in the account for the payment of electric service of the Municipality, in the event plaintiff-appellee would not had taken the steps on the basis of the contract. Plaintiff-appellee claims the payment of 50% from this money saved by the Municipality, that is, the sum of $1,202,050.69. The Municipality of San Juan derived

benefits in the aggregate amount of $2,404,101.38, used by it for other purposes since it was not bound to pay same to the Electric Power Authority. It is fair and reasonable that as any person bound by a contract which is not in contravention of law, morals, or public order, the Municipality of San Juan pays to plaintiff-appellee the amount claimed for services rendered. In failing to do or recognize this constitutes an unjest enrichment on the part of the Municipality of San Juan, in detriment to the appearing plaintiff-appellee.

Because of the steps taken by plaintiff-appellee, which acted pursuant to the contract subscribed between the parties, and as a result of the credits obtained from the Electric Power Authority during the thirty six (36) months of the credits, the Municipality of San Juan obtained savings in the sum of $2,629,682.84 payable to the Electric Power Authority. The appearing party claimed for this item the sum of $1,314,841.42 in accordance with the clauses contained in the above mentioned contract. This represents money that the Municipality of San Juan was able to appropriate for other purposes in subsequent years since the obligation of paying a high cost for electric power to the Electric Power Authority no longer existed. Said payment was avoided by reason of the steps taken by plaintiff-appellee.

All the above was expressly recognized by the Honorable Pedro J. Martínez Montañez, Judge of the Superior Court of Puerto Rico, San Juan Part. He had before him all the evidence available and heard the witnesses presented by the Electric Power Authority. They testified that credits were granted in the sum of $2,404,101.38, and that they applied the mathematical formula on the basis of subsequent actual consumptions. Thus, according to the testimony given by the employees of the Electric Power Authority, they reached the estimate of $2,629,682.84 set forth herein for future savings.

The Municipality of San Juan is a party as any other, which is bound to comply with the clauses and conditions permitted in a valid contract. To allow it not to abide by the obligations after it benefitted itself in the total sum of $5,033,784.22 would constitute an injustice.

There is no excessive onerousness by virtue of this contract considering that the Municipality derived benefits therefrom in an amount in excess of five million dollars. However, it actually exists an unjust enrichment when after obtaining benefits in excess of five million dollars refuses to pay to the appearing party the total sum of $2,516,892.11 claimed as fees for services rendered.

The Municipality of San Juan could argue that it is unjust to oblige it to pay for future savings and that for said reason the claim filed by the appearing party should be reduced to $1,202,050.69. But what is not fair and falls clearly within the scope of unjust enrichment is that if the Municipality of San Juan received credit for $2,404,101.38 from the Electric Power Authority, that according to a valid contract, be permitted to avoid the payment of a just and reasonable claim of 50% thereunder, that is, the total sum of $1,202,050.69.

We respectfully disagree from the judgment entered by this Honorable Court since a portion of certain incorrect figures, which was induced to believe by the defendant-appellant, in the sense that the amount payable in consideration of the contract is higher than the profits received by the Municipality of San Juan pursuant to the contract. What is actually correct is that the Municipality of San Juan received benefits for the contract in question in an amount in excess of five and a half million dollars and not of $2,404,101.38, as mentioned in page two of the judgment.

PRAYER

WHEREFORE, plaintiff-appellee respectfully prays from this Honorable Court to take into consideration all the issues herein raised and after the corresponding proceedings are held, to set aside the judgment entered by this Honorable Court on February 14, 1984; and that judgment be entered according to the law and court decisions quoted above, denying the Writ of Review filed by defendant-appellant and allowing that the judgment appealed from be complied with in all its scope and effects.

I CERTIFY: That on this date I have sent a true and faithful copy of this writ to defendant-appellant, through its counsel, Atty. Maritza Pagán de Joglar and Atty. Juan F. Doval, P. O. Box 705, Cataño, Puerto Rico 00632.

RESPECTFULLY SUBMITTED in San Juan, Puerto Rico, on February 23, 1984.

(sgd.) Ramón Mauras Valentín
RAMON MAURAS VALENTÍN
COUNSEL FOR APPELLEE
P. O. BOX 29942
65TH INFANTRY STATION
RÍO PIEDRAS, PUERTO RICO
00929-0942
TEL. 751-1744

APPENDIX II

IN THE

SUPREME COURT OF PUERTO RICO

No. R-83-51
R-83-52

UTILITY CONSULTING SERVICES, INC.
Plaintiff and Appellee,

v.

MUNICIPALITY OF SAN JUAN and
DR. HERNAN PADILLA
Defendant and Appellant.

REVIEW

RESOLUTION

San Juan, Puerto Rico, this 19th day of March, 1984

To the foregoing motion to reconsider, not granted.

So was agreed by the Court and certified by the Clerk. Associate Judge Mr. Rebollo López would reconsider. The Chief Judge, Mr. Trías Monge did not participate. Associate Judge Mr. Negrón García abstained.

(Signed)
LADY ALFONSO DE CUMPIANO
Clerk

APPENDIX III

IN THE

SUPREME COURT OF PUERTO RICO

No. R-83-51
R-83-52

UTILITY CONSULTING SERVICES, INC.
Plaintiff and Appellee,

v.

MUNICIPALITY OF SAN JUAN and
DR. HERNAN PADILLA
Defendant and Appellant.

REVIEW

MOTION REQUESTING THE RETENTION OF MANDATE

TO THE HONORABLE COURT:

COMES NOW party plaintiff appellee, Utility Consulting Services, Inc., represented by the undersigned attorney and very respectfully states and prays:

1. That the past 27 of March 1984 we received copy of the Resolution entered on the present case dated 19 March 1984 denying the Motion for Reconsideration filed by the appearing party with date 23 February 1984.

2. That in view of what is provided by Rule 45(e) of the Rules of the Supreme Court of 1975 the appearing party very respectfully requests of this Honorable Court the retention of the mandate to make the corresponding requirements of a

Petition of Review in the Honorable Supreme Court of the United States of America.

WHEREFORE: The appearing party very respectfully requests from this Honorable Court that the remedy requested be granted.

CERTIFY: That on this date I have sent a true and exact copy of this pleading to the defendant appellant party, through Maritza Pagán de Joglar, Esquire, to her address, Box 705, Cataño, Puerto Rico 00632.

In San Juan, Puerto Rico, on March 28, 1984.

RAMON MAURAS VALENTIN
Attorney for the Plaintiff
Appellee Party
P. O. Box 29942
65th Infantry Station
Río Piedras, Puerto Rico 00924-0942
Tel. 751-1744

APPENDIX IV

IN THE

SUPREME COURT OF PUERTO RICO

Civil No. R-83-51
R-83-52

UTILITY CONSULTING SERVICES, INC.
Plaintiff and Appellee,

v.

MUNICIPALITY OF SAN JUAN and
DR. HERNAN PADILLA
Defendants and Appellants.

REVIEW

MOTION FOR RECONSIDERATION OF DENIAL OF REQUEST FOR THE RETENTION OF MANDATE

TO THE HONORABLE COURT:

NOW COMES the plaintiff appellee party Utility Consulting Services, Inc., represented by the undersigned attorney and very respectfully states and prays:

1. That the past 28 March 1984 it was filed in the present case a Motion Requesting the Retention of the Mandate in the present case in accordance with the provisions of Rule 45(e) of the Rules of the Supreme Court of 1975 because the appearing party was to commence the requirements to obtain the filing in the Supreme Court of the United States the review proceedings corresponding to the Judgment entered by this Honorable Court in the present case on the date of February 14 of 1984.

2. That recently we received copy of the Resolution entered by this Honorable Court with the date of 12 April 1984 in which it denied our Motion Requesting the Retention of the Mandate.

3. That the appearing party has already contacted a law firm of the Nation's Capital to proceed with the filing of the corresponding documents both in the Federal Supreme Court and the Supreme Court of Puerto Rico to viabilize our Request for Review of the aforementioned Judgment, for which reason we respectfully understand that the Mandate should be detained as provided by Rule 45(e) for a reasonable time to give this party the opportunity of complying with all of the corresponding procedural requirements.

WHEREFORE: It is very respectfully requested from this Honorable Court to set aside its Resolution dated 12 April 1984 during our Request for Retention of Mandate and we be permitted to continue with the corresponding steps required to obtain the corresponding review in the Clerk's office of the Supreme Court of the United States of America within the reasonable period provided by Rule 45(e).

CERTIFY: That on this date I have sent a true and exact copy of this pleading to defendant appellant party, through Maritza Pagán de Joglar, Esq., Box 705, Cataño, Puerto Rico 00632.

RESPECTFULLY SUBMITTED, in San Juan, Puerto Rico, this date 17 of April of 1984.

RAMON MAURAS VELENTIN
P.O. Box 29942
65th Infantry Station
Rio Piedras, Puerto Rico 00929-0942
Tel. 751-1744

APPENDIX V

IN THE

SUPREME COURT OF PUERTO RICO

No. R-83-51
R-83-52

UTILITY CONSULTING SERVICES, INC.,
Plaintiff-Appellee,

v.

MUNICIPALITY OF SAN JUAN,
DR. HERNAN PADILLA,
Defendants-Appellants.

MOTION SEEKING TO SET ASIDE JUDGMENT

TO THE HONORABLE COURT:

NOW COMES party plaintiff and appellee, represented by the undersigned attorney and most respectfully states and prays:

1. That in the instant case judgment was entered on February 14, 1984, to which the appearing party timely requested the reconsideration, having resulted in a resolution of denial.

2. That the appearing party has requested the retention of the corresponding mandate on the grounds that it plans to present a writ of review before the Honorable Supreme Court of the United States, having this motion resulted in a resolution of denial to which a reconsideration has been requested.

3. That the appearing party respectfully understands and requests from this Honorable Court that it set aside the judgment whose revision is planned for the following grounds:

1. The judgment was entered without jurisdiction to do so because the term provided to file the writ of review had elapsed.

2. The judgment denies or deprives party defendant and appellee of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

3. The judgment violates the constitutional right of plaintiff and appellee to the freedom of contract in violation of Article 1 clause 10 of the Constitution of the United States of America.

WHEREFORE, the appearing party respectfully requests that the judgment entered on February 14, 1984 be set aside.

I CERTIFY: That on this day I have sent a true and faithful copy of this Motion to the party defendant and appellant, through Attorney Maritza Pagán de Joglar, Box 705, Cataño, Puerto Rico 00632.

In San Juan, Puerto Rico, on April 23, 1984.

(Signed)
RAMON MAURAS VALENTIN
P.O. Box 29942
65th Infantry Station
Rio Piedras, Puerto Rico 00929-0942

APPENDIX VI

IN THE

SUPREME COURT OF PUERTO RICO

No. R-83-51

UTILITY CONSULTING SERVICES, INC.
Plaintiff and appellee,

v.

MUNICIPALITY OF SAN JUAN and
DR. HERNAN PADILLA
Defendant and appellant.

REVISION

RESOLUTION

San Juan, Puerto Rico on May 3, 1984

In regards to the documents filed by the appellee party Utility Consulting Services, Inc. dated April 17 and 23, 1984, respectively, "Motion for Reconsideration of Denial of Request to Retain Mandate" and "Motion Seeking to Set Aside Judgment", not granted.

So was agreed by the Court and so the Clerk certifies. The Chief Judge, Mr. Trias Monge and Associate Judge Mr. Negron Garcia did not participate. Associate Judge, Mr. Rebollo Lopez would reconsider.

LADY ALFONSO DE CUMPIANO
Clerk

APPENDIX VII

IN THE

SUPREME COURT OF PUERTO RICO

Case No. R-83-51
R-83-52

UTILITY CONSULTING SERVICES, INC.,
Plaintiff-Appellee,

v.

MUNICIPALITY OF SAN JUAN,
DR. HERNAN PADILLA,
Defendants-Appellants.

RE: PETITION FOR REVISION

MOTION TO DISMISS

TO THE HONORABLE SUPREME COURT:

NOW COMES the party defendant-appellant, (now appellee) duly represented by its subscribing attorney and respectfully states, alleges and prays:

1. The Honorable Supreme Court entered Judgment in the instant case on February 14, 1984 reversing the reviewed judgments and dismissing the complaint with costs to plaintiff appellee (now appellant).

2. Party plaintiff-appellee requested from the Supreme Court the reconsideration of said Judgment on February 23, 1984.

3. On March 19, 1984 the Supreme Court denied the reconsideration requested.

4. Plaintiff appellee did not request the subsequent reconsideration within the following three working days, as established by Rule 45(c) of the Rules of the Supreme Court.

5. On April 23, 1984 plaintiff appellee filed before the Supreme Court a Motion Requesting Judgment Be Set Aside. This motion in no way could be considered a Second Motion for Reconsideration, for as such it would have been untimely, as seen from what is stated in the prior paragraph.

6. On My 3, 1984 the Supreme Court denied the motion Requesting Judgment Be Set Aside.

7. On June 28, 1984 plaintiff appellee filed before the Supreme Court a Notice of Appeal to the Supreme Court of the United States.

8. The term to file Notice of Appeal and to Docket it, in the instant case, is ninety days. See Rule 12, paragraphs .1 and .3 of the U.S. Supreme Court Rules.

9. Said 90 day term begins, according to Rule 11 of the U.S. Supreme Court; in paragraph .3 . . . "from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate. . . However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties . . . runs from the date of the denial of rehearing or the entry of a subsequent judgment."

10. A reconsideration having been requested in the instant case, the time for filing a notice of appeal began when the reconsideration was denied on March 19, 1984.

11. The notice of appeal was filed on June 28, 1984, that is, one hundred and one days after the denial of the reconsideration.

12. The intermediate filing of the Motion Requesting Judgment Be Set Aside does not have the effect of interrupting or re-stating the term to appeal because its denial of the Supreme Court on May 3, 1984 did not constitute a "subsequent judgment".

13. From the above, it clearly follows that the notice of appeal filed by plaintiff appellee before the Supreme Court of the United States is untimely.

14. Rule 14 paragraph .2 of the U.S. Supreme Court grants to the Supreme Court of Puerto Rico as the Court whose judgment is being appealed, in this case, through a motion of the party appellee and notification to the party appellant, the power to discuss the appeal when the notice of appeal and its docketing have not been made within the time established, which is here of ninety days. Paragraph .2 of Rule 14 states literally:

> "If a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, plus any enlargement thereof duly granted, the court whose judgment is the subject of the appeal may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such order thereon with respect to costs as may be just."

For the previous considerations it is respectfully requested from the Supreme Court the dismissal of the appeal filed by plaintiff appellee in the instant case before the Supreme Court of the United States.

In San Juan, Puerto Rico, on July 16, 1984.

I hereby CERTIFY that on this date I have sent copy of the present motion to dismiss, by certified mail, to Attorney Antonio Córdova González, attorney of plaintiff-appellee, to his postal address, P.O. Box 2446, San Juan, P.R. 00903.

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